No. 1[redacted]178

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1918

John Kenny,
Petitioner,

vs.

Laban Miles and John L. Bird, Administrator of the Estate of Lah-tah-sah, a deceased member of the Osage Tribe of Indians, Roll No. 256,
Respondents.

No.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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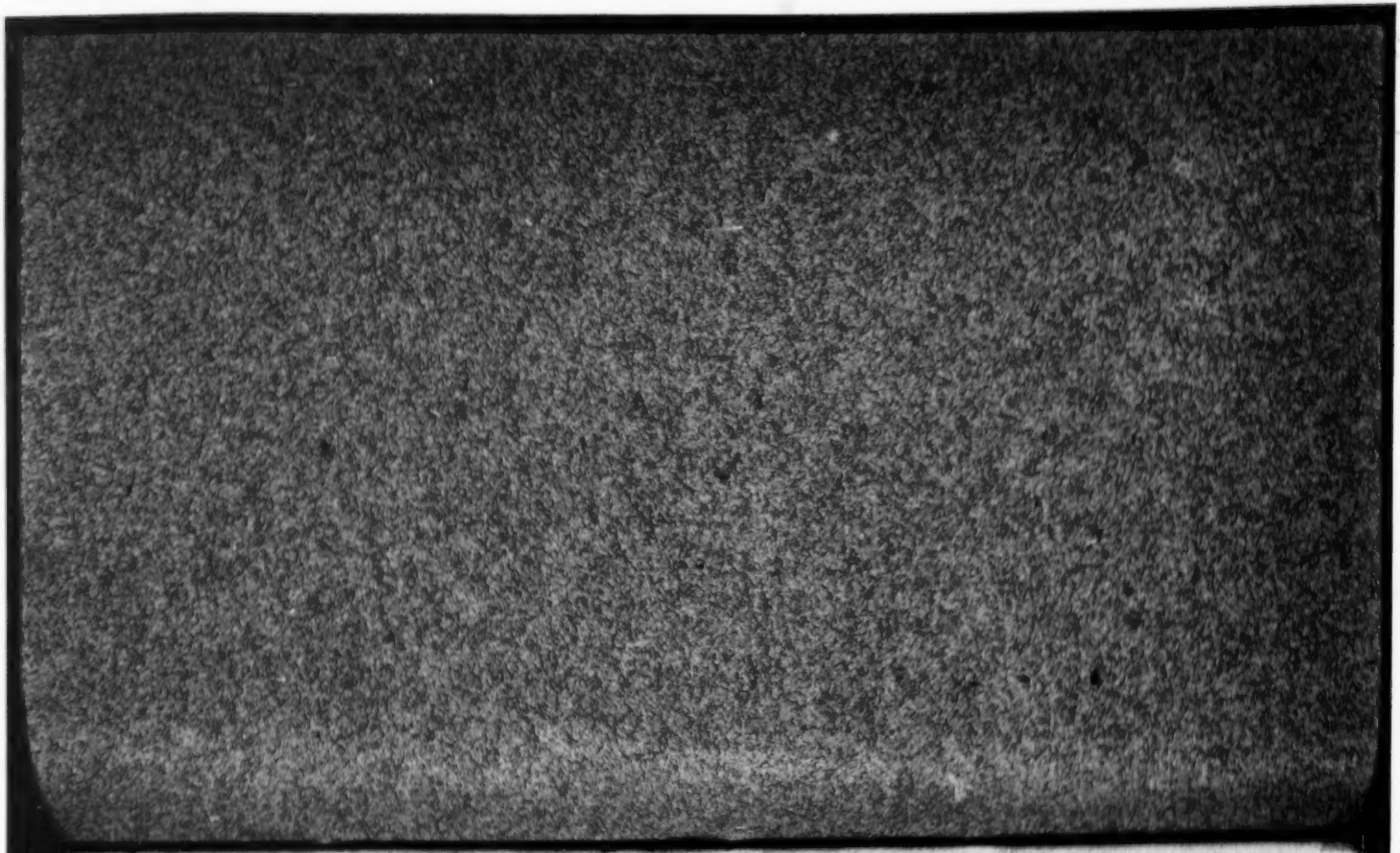

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STATEMENT.

Lah-tah-sah was an Osage Indian woman, whose name was placed on the approved roll of the legal membership of the Osage tribe of Indians opposite the No. 256, when the roll of the legal membership of said tribe was made up, under the provision of the Act of Congress, approved June 28,

1906 (34 St. L. 539). Said Lah-tah-sah died, intestate, on the 19th day of August, 1908, before receiving a distributive share of the tribal property under said Act of Congress, which she would have been entitled to receive had she lived until distribution was made. Upon her death her right to participate in the division and distribution of the tribal properties passed, by descent, to her legal heirs, and after her death deeds conveying the lands involved, were executed in her name, as grantee, approved by the Secretary of the Interior, and recorded in the office of the Register of Deeds of Osage County, Oklahoma. These lands descended to her heirs, according to the laws of the State of Oklahoma, put in force by Section 6 of the Act of Congress, *supra.*

On February 28, 1913, respondent, Laban Miles, began an action in the District Court of Osage County, Oklahoma, to effect a partition of said land, alleging that he was the surviving husband and the petitioner, John Kenny, the only child of said Lah-tah-sah, Roll No. 256, and that upon her death, each succeeded to an undivided one-half of the lands allotted and deeded in her name; to this petition John Kenny filed his answer and cross petition, averring that he was the only heir of the said Lah-tah-sah, by reason whereof he was the sole owner of the lands involved; that he was in the constructive possession of said lands and entitled to the exclusive, actual possession thereof; that the claim of Laban Miles constituted a cloud upon his title and prayed that he be adjudged to be the sole owner of said lands, and entitled to immediate and exclusive possession thereof, and that the title in and to the said described lands be quieted in him. Said John Kenny sought to establish that his mother, Lah-tah-sah, was never married to said Laban Miles, by reason whereof Laban Miles was not an heir of her estate. The court, after hearing the evidence of many witnesses, made findings of fact and conclusions of law and rendered a judgment adjudging that Laban Miles and said Lah-tah-sah were duly and legally married, and thereafter lived together as

husband and wife, until the death of said Lah-tah-sah, a period of eleven months (Certified Rec. 25-28).

Meanwhile the respondent, John L. Bird, had been appointed administrator of the estate of said Lah-tah-sah, deceased, and on January 28, 1914, filed his final account in the Probate Court, alleging the heirs to be Laban Miles, surviving husband, and John Kenny, a son, each entitled to one-half of said estate; thereafter, on the 28th day of February, 1914, said John Kenny filed his objections and exceptions to said final account, as follows:

"Comes now John Kenny, son of the decedent, and alleges that he is the sole and only heir at law of said Lah-tah-sah; that he is the son of such decedent; that Laban Miles is not an heir of said decedent, and this said John Kenny objects and excepts to the final report of the administrator herein in that said report suggests that Laban Miles is an heir of such decedent, when in truth and in fact he is not.

"Wherefore, the said John Kenny prays that this court inquire, ascertain, and determine that the said Laban Miles is not an heir and has no interest in said estate; and that said John Kenny is the sole and only heir and that the whole of said estate be distributed to him and that said report be amended accordingly" (Certified Rec. 22).

To the objections and exceptions of said John Kenny the said Laban Miles filed a Plea of Res Adjudicata, as follows:

"Plea of Res Adjudicata (Certified Rec. 23-28).

"Comes now Laban Miles and alleges and states that on the 25th day of April, 1913, the District Court of Osage County, Oklahoma, rendered a judgment in the case of Laban Miles, plaintiff, versus John Kenny, defendant, in case No. 1896 in said court, by which judgment the heirs of the estate of Lah-tah-sah, Osage Allottee No. 256, deceased, were ascertained and determined. A copy of said judgment is hereto attached, marked 'Exhibit A' and made a part hereof; that in said judgment the validity of the marriage of said Laban Miles and said Lah-tah-sah, deceased, was ad-

judicated; that the time during which an appeal might have been taken from said judgment of the District Court has long since expired; that no appeal from said judgment has been taken; that said John Kenny appeared in person and by Hargis & Conwell, his attorneys, at the trial in the above entitled cause wherein said judgment was rendered and participated in the trial thereof, which said trial extended over a period of five days and many witnesses were called by each of the respective parties, and much evidence offered and submitted by the respective parties upon which said judgment was based and rendered. That said Laban Miles and John Kenny are the only parties claiming any interest in said estate. That the subject-matter involved in the District Court judgment was the same that is herein involved as relating to the validity of marriage and determination of ownership; that on Sept. 12, 1908, M. L. Garrett was appointed administrator of the estate of said Lah-tah-sah, deceased, and fully administered upon the estate, paid all debts and was discharged as such administrator on April 5, 1910.

"By reason whereof said Laban Miles alleges that the matter of the determination of the legal heirs of said Lah-tah-sah, deceased, has been fully adjudicated and all matters and claims relating thereto have become and are res adjudicata, and said Laban Miles pleads the same as a bar to the res adjudication thereof by this court and alleges that this court has no jurisdiction thereof.

Exhibit A.

"In the District Court in and for Osage County, Oklahoma.
"No. 1896. Laban Miles, Plaintiff, vs. John Kenny, Defendant.

"JOURNAL ENTRY (Certified Rec. 25-28).

"On the 25th day of April, 1913, same being a regular judicial day of the March, 1913, term of said court, the above entitled cause came on for hearing in its regular order, pursuant to agreement of the parties, before R. B. Boone, special judge agreed upon by the parties.

"The plaintiff appearing in his own proper person and by White & Widdows, his attorneys, and the defendant appearing in his own proper person and by Hargis & Conwell, his attorneys, and all parties waiving trial by jury, announced ready for trial by the court. And thereupon the plaintiff began introduction of his testimony and said cause was on trial in said court before said special judge, all parties being present in their own proper persons and by their attorneys, as hereinabove set forth on the 25th and 26th days of April, 1913, and on the 26th day of April the trial was adjourned to the 29th day of April, 1913, at noon, at which time said trial was resumed before said special judge, all parties being present in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd, inclusive, during which time the plaintiff introduced his testimony and rested, and thereupon the plaintiff offered his testimony in rebuttal and rested. And the court, after examination of the pleadings and hearing the arguments of Counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and

"Now, on this 24th day of May, 1913, after due consideration of all the evidence and arguments of counsel and being fully advised in the premises, the court finds the following facts:

"That in September, 1907, the plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah, she-me-tsa-he, according to Osage Indian customs, entered into an agreement with Lah-tah-sah whereby he and Lah-tah-sah agreed to become man and wife. That both were full-blood members of the Osage Indian Tribe and unmarried at the time. That they thereupon assumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August, 19th, 1908, a period of eleven months. That the morning after they assumed such relationship, the defendant, John Kenny, the son of Lah-tah-sah

by a former husband, received a horse given away by Hluah-wah-tah, the brother-in-law of plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indinan custom, which horse defendant sold, appropriating the money to his own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marirage of Indians of the age of Laban Miles and Lah-tah-sah, and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah were at said feast. That Laban Miles and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments.

"That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. They were also so recognized during this time by the Osage Indian Agency and the Interior Department. That after assuming said relationship in September, 1907, they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

"Conclusions of Law.

"That plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of said Lah-tah-sah; that plaintiff, Laban Miles, is the surviving husband of said Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition.

"The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

"The court further finds that the plaintiff, Laban Miles, and defendant, John Kenny above named are the only heirs at law of said Lah-tah-sah, deceased, and as such plaintiff Laban Miles owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, to-wit:

"NW¼ of Section 36, Township 24, Range 4, NE¼ of Section 30, Township 28, Range 9, SE¼ of Section 30, Township 28, Range 9; Lot 3, E½ of SW¼ NW¼, SE¼ of NW¼, N½ of SE¼ of Section 4, Township 20, Range 10, all north and east of the Indian Base and Meridian in Osage County Oklahoma.

"The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties to this action as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or any party to this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands

"It is therefore ordered, adjudged and decreed by the court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership herein is as follows:

"Laban Miles, plaintiff, Osage Allottee No. 507, an undivided one-half; John Kenny, defendant, Osage Allottee No. 2857, an undivided one-half; and that the shares of the aforesaid parties and their respective interest in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom and W. E. Savage are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition can

not be made, the commissioners herein named shall make a valuation and appraisement of the property herein described anl make a report of their proceedings to the court."

After hearing the evidence, the probate court, upon the hearing of the final account of the administrator, rendered the following judgment (Certified Rec. 36-37).

"Now, on this 14th day of March, 1914, the above entitled matter coming on for hearing before Chas. R. Gray, special judge, pursuant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914, claimant, Laban Miles, appearing by White & Widdows, his attorneys, and claimant, John Kenny, appearing by John Embry and A. S. Sands, his attorneys, and further appearing in his own proper person, and the court having heard the evidence and the arguments of counsel, and being fully advised in the premises finds:

"That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, that said administrator has made no profit out of said estate and has made disbursements as stated in accounts, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

"The court further finds that the administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

"The court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and John Kenny, to-wit: An undivided one-half to each.

"It is therefore ordered, adjudged and decreed by the

court that the final account of John L. Bird, administrator of said estate, be, and the same hereby is, by the court approved, and that said John L. Bird deduct from the money in his hands, belonging to said estate, the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor, in this court; that said administrator pay the court costs now due and unpaid, out of the money in his hands, belonging to said estate, and file receipt therefor in this court.

"It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenny, to-wit, an undivided one-half thereof to each and that upon the payment of costs and administration fees, as herein above provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file same in this court and thereupon be discharged. To all of which findings and judgment of the court said John Kenny excepts and upon his request the court fixes appeal bond at three hundred dollars."

On March 20, 1914, the said John Kenny served notice that he intended to appeal from the judgment of the Probate Court of Osage County, Oklahoma, to the District Court of Osage County, Oklahoma on both questions of law and fact (Certified Rec. 43-46). Thereafter an appeal bond was filed and said matter appealed to the District Court. On the 2nd day of April, 1915, after hearing the evidence the District Court made findings of fact and rendered the following judgment (Certified Rec. 117-120):

"It is therefore ordered, adjudged and decreed by the court that the plea of *res adjudicata* of appellee, Laban Miles, should be, and the same hereby is, by the court, sus-

not be made, the commissioners herein named shall make a valuation and appraisement of the property herein described anl make a report of their proceedings to the court."

After hearing the evidence, the probate court, upon the hearing of the final account of the administrator, rendered the following judgment (Certified Rec. 36-37).

"Now, on this 14th day of March, 1914, the above entitled matter coming on for hearing before Chas. R. Gray, special judge, pursuant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914, claimant, Laban Miles, appearing by White & Widdows, his attorneys, and claimant, John Kenny, appearing by John Embry and A. S. Sands, his attorneys, and further appearing in his own proper person, and the court having heard the evidence and the arguments of counsel, and being fully advised in the premises finds:

"That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, that said administrator has made no profit out of said estate and has made disbursements as stated in accounts, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

"The court further finds that the administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

"The court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and John Kenny, to-wit: An undivided one-half to each.

"It is therefore ordered, adjudged and decreed by the

court that the final account of John L. Bird, administrator of said estate, be, and the same hereby is, by the court approved, and that said John L. Bird deduct from the money in his hands, belonging to said estate, the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor, in this court; that said administrator pay the court costs now due and unpaid, out of the money in his hands, belonging to said estate, and file receipt therefor in this court.

"It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenny, to-wit, an undivided one-half thereof to each and that upon the payment of costs and administration fees, as herein above provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file same in this court and thereupon be discharged. To all of which findings and judgment of the court said John Kenny excepts and upon his request the court fixes appeal bond at three hundred dollars."

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"It is therefore ordered, adjudged and decreed by the court that the plea of *res adjudicata* of appellee, Laban Miles, should be, and the same hereby is, by the court, sus-

tained and that the final account of said John L. Bird, administrator of said estate be, and the same hereby is, by the court, approved and that said John L. Bird deduct from the money in his hands belonging to said estate the sum of $12.00 as compensation for services rendered by him in said estate and file a receipt therefor; that said administrator pay the accrued costs in the county court now unpaid less the cost of preparing transcript for appeal, out of the money in his hands belonging to said estate, and file receipt therefor; that appellant, John Kenny, pay the costs accruing on appeal, including the costs of transcript in the county court.

"It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, Osage Allottee No. 256, are Laban Miles, surviving husband, and John Kenny, the only living issue of said Lah-tah-sah, deceased, at the time of her death; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and to said John Kenny, to-wit, an undivided one-half thereof to each, and that upon the payment of costs and administration fees by said administrator as herein provided, that said administrator pay the remainder now in his hands belonging to said estate, one half to said Laban Miles and one-half to said John Kenny, and take their receipt therefor, to all of which rulings, orders and judgment of the court, said John Kenny objects and excepts, which objections and exceptions are by the court allowed."

BRIEF AND ARGUMENT.

No Federal Question Raised or Presented.

No Federal question is presented in the record. The only question litigated, or sought to be litigated, by petitioner, John Kenny, at any time, or in any action, is the question of the marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles. If Laban Miles was the surviving husband of Lah-tah-sah, he was an heir. Sec. 6895 of Wilson's Revised and Ann. Statutes of Oklahoma, then in force, provides *inter alia* for descent in the following manner

> "FIRST: If the decedent leave a surviving husband or wife, and only one child or the lawful issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child."

This statute was made applicable to deceased members of the Osage tribe of Indians by Sec. 6 of the Osage Division Act, *supra*, which provides:

> "Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband, nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally" (35 State. L. 545).

Question of State Law.

Whether Laban Miles is a legal heir of Lah-tah-sah is to be determined by state law exclusively, and is not a federal question. Whether Laban Miles is such heir depends solely upon the question as to whether he was married to, and the surviving husband of Lah-tah-sah. This in turn is governed exclusively by state law, and is not a federal ques-

tion. No other question was raised by John Kenny in his objections to the administrator's final account in the probate court. No other question was raised on appeal from the probate court to the District Court of Osage County, Oklahoma. No other question, other than as to local procedure, was raised, or presented on appeal to the State Supreme Court. The sole object and purpose of John Kenny was to establish himself as the sole heir of his mother, Lah-tah-sah, even though to do so would brand her as an adulteress. In his petition in error to the State Supreme Court his allegations of error in the main are that the trial court erred in "adjudging and decreeing that the final account" of the administrator "be approved." (Not a federal question.) And erred in "adjudging and decreeing that said Laban Miles was the surviving husband, and one of the heirs." (Not a federal question) And erred in "distributing the estate" * * * "one-half to the said Laban Miles and one-half to the plaintiff in error," John Kenny. (Not a federal question)

Whether Lands Allotted Before or After Death Immaterial.

Whether the lands involved were allotted and deed to Lah-tah-sah as grantee in her lifetime, or to her heirs after her death; or whether the lands involved were restricted or unrestricted as to alienation have nothing whatever to do with the question as to whether said Laban Miles was the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Whether Parties Full-Bloods or Mixed-Bloods Immaterial.

Also whether Lah-tah-sah, Laban Miles and John Kenny was, or are, full blood or mixed blood Osage Indians, or whether a certificate of competency has been issued to either of them has nothing to do with the question as to whether Laban Miles was, or is, the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Again, by neither the manner in which, nor the procedure by which a state court decides a purely state ques-

tion, governed solely by state law, and where there is no adverse citizenship, can a federal question be raised or involved.

Whether Laban Miles is Surviving Husband Not Federal Question.

In *Roth* v. *Ehman et al.*, 17 Otto 319, 27 L. Ed. 499, the full decision of this Honorable Court reads as follows:

> "The only question in this case, controverted below, was whether Madelaine Roth, the plaintiff in error, was the widow of John George Roth, deceased, and that depended entirely on the validity of the decree of the Royal Matrimonial Court of Elwangen, in the Kingdom of Wurtemburg, annulling the marriage of the parties. The Supreme Court of Illinois decided in favor of the Wurtemburg decree and consequently, that the plaintiff in error was not the widow of the decedent and not entitled to dower in his estate, or to inheritance under the laws of Illinois. This presents no question of which we can take cognizance under Section 709 of the Revised Statutes. No right, title, privilege or immunity which could be claimed under the authority of the United States was involved, and the validity of no treaty or statute of, or any authority exercised under the United States was drawn in question. Neither was there any statute or authority of the State relied on, which was in conflict with the Constitution, treaties or laws of the United States.
>
> "The motion to dismiss for want of jurisdiction is granted."

Also:

> "The question of the true construction of a will depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws or treaties of the United States." *Giles* v. *Little*, 134 U. S. 645, 33 L. Ed. 1062.

Whether Laban Miles was the surviving husband of

Lah-tah-sah was a question of fact to be determined by the State court only, and under the State law applicable to the facts.

Questions of Fact Not Reviewed by Federal Supreme Court.

The Supreme Court of the United States has no power under Sec. 237 R. S. to review a finding of fact by a State court, even though the finding determines whether or not a federal question is presented. *King* v. *W. Va.*, 216 U. S. 92, 54 L. Ed. 396; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 159, 43 L. Ed. 770.

> "The Supreme Court will not review a final state court judgment, even if it denies some title, right, privilege, or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege, or immunity was 'specially set up' or claimed and denied in the state court as belonging to such party under the Constitution or some treaty, statute, commission, or authority of the United States." *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. Ed. 1149.

> "To give the Supreme Court of the United States jurisdiction to review a judgment of a state court because of its denial of a right, title, privilege, or immunity claimed under the Constitution, or any law or treaty of the United States, it must appear of record that such 'right, title, privilege, or immunity' was 'specially set up' or claimed at the proper time and in the proper way." *Texas & P. R. Co.* v. *Southern P. Co.*, 137 U. S. 48, 34 L. Ed. 614; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. Ed. 206; *French* v. *Hopkins*, 124 U. S. 524, 31 L. Ed. 536;*Spies* v. *Illinois*, 123 U. S. 131, 31 L. Ed. 80; *Chappell* v. *Bradshaw*, 128 U. S. 132, 32 L. Ed. 369; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. Ed. 225.

Only Right Claimed by Petition.

The only right claimed by petitioner, John Kenny, was the right which he claimed to relitigate the question of the

marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles, when the matter came up in the county, or probate court, on the final account of the administrator for determination of heirs. This claim involved no "right, title, privilege, or immunity claimed under the Constitution, or any treaty or statute" of the United States. The judgment pleaded as *res judicata* was a state judgment, based on state law governing judgments rendered in actions for the partition of real estate, and whether the state court was right or wrong in sustaining the plea of *res judicata* it was purely a matter of local law and local practice. The admission of the former judgment in evidence in a matter triable only in a state court and under state law was a denial of no federal right and raised no federal question.

> "A decision against a right set up under U. S. Rev. Stat. Sec. 2339 providing for th protection of vested water rights, is not involved in a judgment of a state court denying such rights, which rest solely upon a decision upon questions of fact or local law upon which rights under that section depend." *Telleride Power Trans. Co.* v. *Rio Grande Western R. Co.*, 187 U. S. 659, 47 L. Ed. 307.

Decision of State Court Plainly Right

> "If it appears that the decision of the federal question was so plainly right as not to require argument, the writ should not be allowed." *Spies v. Illinois*, 123 U. S. 574, 28 L. Ed. 1084.

> "A federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a state court." *Parker v. McClain*, 237 U. S. 469, 59 L. Ed. 1051.

Sections of Oklahoma Statute on Partition.

The sections of the Revised Laws of Oklahoma 1910 on partition of real estate applicable in the case at bar as

relate to the partition judgment pleaded as *res judicata* are as follows:

> "Sec. 4940. When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interest of the owners thereof, if known."
>
> "Sec. 4941. If the number of shares or interest is known; but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty."
>
> "Sec. 4943. The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants."
>
> "Sec. 4944. After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly."
>
> "Sec. 4955. The court shall have full power to make any order, not inconsistent with the provisions of this article, that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests."

District Court Has Power to Determine Heirs in Partition Suit.

Under this, and the preceding sections of the statute quoted, we think that this court in a partition suit not only has jurisdiction to, but must make an order specifying the interests of the respective parties and direct that partition be made accordingly, as required by Sec. 4944, which would authorize the determination of heirship where ownership was acquired by inheritance. Sec. 4955 authorizes the court to make any order that may be necessary

to make a just partition between the parties and to secure their respective interests. That this is the rule in other states, see the following:

> "Any court assuming jurisdiction of the proceeding for partition must undertake to determine to whom the estate of the decedent has passed either by inheritance or devise."
>
> 30 Cyc. 198, and note 40.

That this is the law in Oklahoma is established by the following cases in which the district court decided questions of heirship in partition suits:

Irving v. *Diamond,* 100 Pac. 557, 23 Okl. 325.
DeGraffenreid v. *Iowa Land & Trust Co,,* 20 Okl. 687, 95 Pac. 624.
Barnett v. *Way,* 29 Okl. 780, 119 Pac. 418.
Divine v. *Harmon,* 30 Okl. 820, 121 Pac 219.
Bilby v. *Brown,* 34 Okl. 738, 126 Pac. 1024.
Coachman v. *Sims,* 36 Okl. 536, 129 Pac. 845.
Hill v. *Hill,* —— Okl., ——, 160 Pac. 1116.

There is no more reason why the district court has authority to pass on disputed questions of heirship in actions to quiet title, actions in ejectment and actions to declare a resulting trust, than in partition actions. The following are some of the Oklahoma cases where the District Court decided contested questions of heirship:

Cases Where Oklahoma District Court has Determined Heirs Affirmed by Federal Supreme Court.

Washington v. *Miller,* 34 Okl. 259, 129 Pac. 58, affirmed *Washington* v. *Miller,* 235 U. S. 422, 59 L. Ed. 295. (To quiet title.)
Woodward v. *DeGraffenreid,* 36 Okl. 81, 131 Pac. 162, affirmed in 238 U. S. 284, 59 L. Ed. 1310. (Ejectment.)
Brady v. *Sizemore,* 33 Okl. 169, 124 Pac. 615, affirmed in 235 U. S. 441, 59 L. Ed. 308. (To determine question of heirship.)

McDougal v. *Mckay,* 43 Okl. 261, 142 Pac. 987, affirmed in 237 U. S. 372, 59 L. Ed. 1001. (To determine heirs of Creek infant enrolled after death.)

Pigeon v. *Buck,* 38 Okl. 101, 131 Pac. 1983, and *Roberts* v. *Underwood,* 38 Okl. 376, 132 Pac. 673, consolidated and affirmed in 237 U. S. 386, 59 L. Ed. 1007. (To quiet title.)

OTHER OKLAHOMA CASES.

Ground v. *Dingman,* 33 Okl. 760, 127 Pac. 1078. (Quiet title.)

Morley v. *Fewell,* 22 Okl. 452, 122 Pac. 700. (Quiet title.)

Warren v. *Canard,* 30 Okl. 514, 120 Pac. 599. (Quiet title.)

Shellenberger v. *Fewell,* 34 Okl. 79, 124 Pac. 617. (Ejectment and quiet title.)

Hooks v. *Kennard,* 28 Okl. 457, 114 Pac. 744. (Ejectment.)

Sanders v. *Sanders,* 28 Okl. 59, 117 Pac. 338. (Ejectment.)

Cyr v. *Walker,* 28 Okl. 281, 116 Pac. 931. (Ejectment.)

Clarkson v. *Washington,* 38 Okl. 4, 131 Pac. 935. (Ejectment.)

Buck v. *Branson,* 34 Okl. 807, 127 Pac. 436. (Ejectment.)

Bruner v. *Sanders,* 26 Okl. 676, 110 Pac. 730. (Ejectment.)

Lamb v. *Baker,* 27 Okl. 739, 117 Pac. 189. (Ejectment.)

Reynolds v. *Fewell,* 34 Okl. 112, 124 Pac. 623. (Ejectment.)

Ground v. *Dingman,* 33 Okl. 760, 127 Pac. 1078. (Ejectment.)

Fearnow v. *Jones,* 34 Okl. 694, 126 Pac. 1015. (To declare resulting trust.)

Judgment of District Court in Partition Suit is a Final Judgment and May Be Appealed From.

The judgment and decree of partition fixed the interests and ownership of the lands involved in the parties to the action, who are the same parties to the case at bar. No appeal was taken, and time in which an appeal might have been taken had expired when the plea of *res adjudicata* was filed. An appeal could have been taken prior to sale. In *State ex rel. Mose* v. *District Court,* not yet officially reported, 149 Pac. 240, the Supreme Court of Oklahoma said:

> "There is no question but what an appeal from a decree of partitions lies from the district court to this court. * * * The purchaser at the sheriff's sale, if it should go to that extent, would have notice of the appeal, and therefore could not be an innocent or protected purchaser."

In the case just quoted from a writ of prohibition was sought to prevent the District Court of Marshall and the presiding judge thereof from entering an order determining the interests of all parties and partitioning certain real estate belonging to full-blood Mississippi Choctaw Indians, on the ground that the lands were restricted Indian lands and that the court had no jurisdiction to partition same. The writ was denied, the court holding that an appeal was a proper and adequate remedy, and that when an appeal will lie from the judgment about to be rendered a writ of prohibition will not lie.

Likewise had a remedy by appeal from the judgment of the District Court in the partition suit, and after the time expired in which an appeal could have been taken, the judgment became *res judicata* and was a good plea in bar in the subsequent proceedings.

The Judgment Pleaded as Res Adjudicata Not Subject to Approval by Secretary of Interior and Same Was Never Submitted for Approval.

The lands involved in the case at bar are *unrestricted,* but if they were restricted the judgment of the court fixing the rights and determining the interests and ownership of the parties does not require, and could not be affected by, the approval or disapproval of the Secretary of the Interior. The judgment of the court rendered in a partition suit is very similar to a judgment rendered in a proceeding to foreclose a real estate mortgage. The judgment in a foreclosure suit fixes the rights of the parties, determines the ownership in the lands if brought in question, establishes priority of liens and orders the lands sold on condition that payment be not made within a time stated. In the event of a sale same is conducted by the sheriff, and although a judicial sale, the acts of the sheriff are ministerial.

The judgment of the court in a partition suit fixes the rights of the parties, determines the ownership of the lands if brought in question, determines the number of shares and the amount of each, establishes priority of liens if any, and orders the lands sold on condition that same cannot be divided or partitioned in kind. In the event of sale, same is conducted by the sheriff as in the case of the sale of lands upon execution. While such sale is a judicial sale, the acts of the sheriff therein are ministerial, and the deed of the sheriff by which such sale is consummated might by law be made subject to the approval of the Secretary of the Interior or the Auditor of State, if a check upon the sheriff was desired in such matters. If the lands are divided or partitioned in kind, this is done by three commissioners appointed for that purpose. Their acts in dividing the lands and reporting such division are ministeral and might by law be made subject to the approval of the Secretary of the Interior, or the Auditor of State.

But not so as to the *judgment of the court* by which the rights of the parties, their ownership and interests in the lands are adjudicated. From such a judgment an appeal lies to the State Supreme Court. And if a federal question be involved, a further appeal would lie to the Federal Supreme Court. If such a judgment of the trial court is subject to approval of the Secretary of the Interior, then the judgment of the State Supreme Court on appeal, and the judgment of the United States Supreme Court on further appeal involving a federal question would be subject to the approval or disapproval of the Secretary of the Interior. Such is the position taken by the petitioner. It is unthinkable.

In conclusion we submit that no federal question is presented.

That the judgment or decree was not rendered in a "suit" as required by the statute authorizing writs of error, or writs of certiorari to state courts, but purely on *ex parte* probate proceedings which arose upon the filing of the final account of the administrator. And,

That the decision of the State Supreme Court is "so plainly right" as to warrant a denial of the petition.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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